Supreme Court, U.S.
FILED

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No. ___

In the

Supreme Court Of The United States

October Term, 1996

ROGER EMERICK

Petitioner,

v.

UNITED TECHNOLOGIES CORPORATION

Respondents.

On Petition for Writ of Certiorari
to the District Court of Connecticut

PETITION FOR WRIT OF CERTIORARI

Pro Se Petitioner:
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QUESTION PRESENTED

Plaintiff worked for defendant corporation, a major defense contractor, and was terminated for concerns expressed through First Amendment forums in the workplace administered by defendant. Pro se plaintiff incorrectly filed a 42 USC 1983 claim which the court dismissed for lack of Connecticut state action. The court refused to allow Plaintiff to file a First Amendment claim to save his Complaint, asserting that because plaintiff failed to allege sufficient facts demonstrating that defendant acted under color of Connecticut state law for purposes of a 42 USC 1983 claim, that defendant could not be subject to suit under the First Amendment.

QUESTION: Can a defense contractor be acting "under color of law" when terminating an employee for concerns expressed on the contractor's private property, when the concerns were made through forums protected by the First Amendment, and administered by the contractor, and where the following facts were alleged:

1. These First Amendment forums, and plaintiff's participation in them, were the result of federal government encouragement and regulation to promote honesty and reduce fraud in government spending.
2. The defendant contracted with the US government to provide plaintiff First Amendment rights through a written signatory commitment to an Executive Order.
3. These First Amendment forums were administered by ombudsman.
4. To fulfill its contractual obligations to the federal government, the defendant, through its Code of Ethics and other company polices, invited and encouraged plaintiff to express employee concerns through these First Amendment forums, without fear of retaliation.
5. The defendant had extensive and sufficient links with the federal government to invoke state action.
6. The defendant retaliated against plaintiff tor exercising his First Amendment rights through these forums.

PARTIES TO THE CASE

Petitioner/Plaintiff:

Roger Emerick, 580 Hopewell Rd., S. Glastonbury, CT 06073

Respondents/Defendants

United Technologies Corporation, UTC Building, Hartford, CT 06101 (UTC has no parent company)

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OPINIONS BELOW

The Connecticut District Court dismissed plaintiff's Complaint, and denied permission to Amend the Complaint with a First Amendment claim, by Memorandum of Decision dated 1-9-96, (Emerick v. UTC, D. Conn. 3:95CV1833 [AHN]), which is contained in Appendix A. A Motion for Reconsideration of the First Amendment claim was denied 2-26-96. The Appellate Court affirmed the decision prohibiting a First Amendment claim by written opinion file dated 11-22-96 (Emerick v. UTC, 2.d Cir., 96-7295), which is contained in Appendix B.

JURISDICTION

The judgement of the Connecticut District Court was filed 1-9-96 and affirmed by the 2.d Circuit Court of Appeals 11-22-96. No motion for rehearing was filed. The jurisdiction of the court is invoked under the First Amendment.

CONSTITUTIONAL ISSUE INVOLVED

The First Amendment of the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Case Chronology

In 1994 the plaintiff was terminated because of his participation in speech forums protected by the First Amendment on his employer's private property. These forums were created and administered by his employer, at the behest of the federal government.

The pro se Plaintiff, naively and not fully understanding the concept of state action, filed a complaint claiming a violation of 42 U.S.C. 1983, which permits claims for violation of federal constitutionally protected speech by Connecticut officials. Defendant's filed a Motion to Dismiss claiming no "Connecticut state action" was involved. Plaintiff made a good faith reply to the Dismissal and in parallel filed a Motion to Amend his Complaint to add a stand alone First Amendment claim, as he should have done in the first place. The district court by memorandum (Appendix A) dismissed plaintiff's §1983 claim for lack of "Connecticut state action" and simultaneously denied amendment of plaintiff's Complaint to add a First Amendment claim on the basis that "Even if the amended complaint alleges a stand alone First Amendment claim, the claim would nevertheless fail for want of state action based on the same analysis above". (A6-7)

In response, plaintiff filed a Motion for Reconsideration presenting facts with relevant evidentiary documentation to support his request to add a First Amendment claim. The District Court denied the reargument without comment and the Complaint was dismissed. Plaintiff appealed to the 2nd Circuit on the grounds that he should have been permitted to file a First Amendment claim. He made the same arguments and provided the same evidentiary documentation as given the District Court. The 2nd Circuit upheld the District Court ruling. (B3-4).

This petition concerns whether the District and 2nd

Circuit Courts erred when they refused to permit plaintiff to even file a First Amendment claim on the grounds that, even if properly alleged, a First Amendment claim would fail for want of state action. (A6, B3-4).

Facts Applicable to a First Amendment Claim

Plaintiff presented the following facts regarding his First Amendment claim to both the District and 2nd Circuit Courts, with supporting evidentiary documents. These facts support the allegations in plaintiff's 11/15/95 Amended Complaint (Appendix C), and excerpts were taken as true, by the District Court in dismissing the Complaint (A2).

The plaintiff was hired as an at-will employee for defendant UTC, a major defense industry contractor. During the summer of 1993 plaintiff participated in UTC's "Straight Talk" and "Dialog" programs, which were administered by UTC ombudsman. The creation and administrative enforcement of the DIALOG and Straight Talk programs, and plaintiff's inducement to participate in them, was **directly attributable to federal government encouragement, coercion, and regulation** in the form of executive orders, federal regulations, and congressional acts as explained below.

As a result of defense contractor procurement scandals during the 1980's, the Congress and the President were in an uproar over how make defense contractors more honest.

President Reagan, by Executive Order 12526, appointed a commission (known as the Packard Commission) to review methods to reduce waste and fraud in government procurement contracts. In June of 1986 the Packard Commission submitted a Final Report with recommendations on how to reduce fraud and dishonesty in defense procurement. The Final Report included Appendix M, entitled Defense Industry Initiatives (DII), which encouraged an atmosphere in defense contractors where employees could voice concerns without fear of

retaliation . On June 9, 1986 UTC became a signatory to the DII, promising to abide by the recommendations therein. On June 20, 1986 UTC president, Bob Daniel, issued a notice to employees that UTC had become a signatory to the DII on June 9, 1986, and to fulfill its commitments under the DII to the federal government, UTC was establishing an office of Ombudsman, and a DIALOG program, both designed to fulfill a commitment to create an atmosphere and a forum where employees could express concerns, including violations of Government Contracting Policies, without fear of reprisal. Shortly thereafter, and concomitantly in furtherance of its obligations under the DII, UTC also issued the UTC Code of Ethics which promised an open atmosphere where employees could express concerns without fear of retaliation.

Additionally, the Code of Ethics also complied with 48 CFR 203.7, which requires defense contractors to have a written Code of Conduct.

Lastly, the Sentence Reform Act of 1988 (passed by Congress and codified under 18 U.S.C. §3553a), confers significant authority upon federal courts to force defense contractors convicted of fraud to develop internal programs to prevent and detect misconduct, and mandates the use of probation if the company does not have an effective program in place to detect and prevent violations of law and contract. For example in US v. Rockwell Int'l Corp, No. 88-48(A)-CBM (C.D. Cal. 3/6/89), Rockwell was fined heavily for defrauding the government despite a Code of Ethics with a self-governing compliance program, because the court found the compliance program less than model.

These facts, all documented for the lower courts, conclusively establish that UTC, and other defense contractors, were strongly encouraged and required by the Federal government to develop their Code of Ethics, ombudsman and DIALOG related programs in which plaintiff participated, and that plaintiff was encouraged to express himself therein without

fear of retaliation.

Through these quasi-government programs plaintiff expressed concerns related to management bonuses at the expense of employee, community and government sacrifices, and the harm of operating a company like UTC for near term profit. In retaliation for plaintiff's participation in these programs, certain UTC executives denied plaintiff a promotion and terminated his employment.

Neither the District nor 2nd Circuit Courts addressed the substance of plaintiff's First Amendment claim. Rather they stated because there was no "Connecticut" state action for the purposes of a 42 USC 1983 claim, then UTC could not be sued under the First Amendment either. (A6, B4).

REASONS FOR GRANTING THE WRIT

The District and 2nd Circuit Courts erred in refusing to permit plaintiff to even file a First Amendment claim to save his case from dismissal on the basis that it appeared beyond doubt that plaintiff could prove no set of facts which would constitute state action for purposes of relief under the First Amendment. (A1, A6, B3). The facts presented in 'Statement of Case', and as argued below, demonstrate that plaintiff has a viable First Amendment claim which he should be permitted to file.

Legal Premise

The abuse of a First Amendment right in a protected forum by private parties entrusted and required by the federal government to create that forum, and protect from retaliation employees who used that forum, mandate a finding of state action and First Amendment protection for the injury to plaintiff caused by his expression in that forum. Private parties may incur liability for their conduct when the individual actor is a willful participant in joint activity with the State or its agents.

Adickes v. S.H. Kress and Company, 398 U.S.. 144, 152, 90 S.Ct. 1598. Both UTC and the Federal government were **joint participants and partners** in activity creating an allegedly protected forum for employee speech, intended to make private contracting with the U.S. government more honest for the government and prolific for UTC.

Where the State has entered the field of private corporate ethics and employee free speech in the private workplace, it places its power, image, and prestige into the activities of the private partner; Subsequent failure to recognize state action in the activities of the private partner in these areas, "... would in many cases permit the Government to endorse and encourage conduct in which it could not itself permissibly engage." Holodnak v. Avco-Lycoming of Stratford, 514 F.2d 285, 289 (2nd Circ, 1975).

Where First Amendment rights exist on private property, federal 'state action' is accounted for in the creation of the protected speech forum, incumbent in which is protection for the user by the private administrator of the forum.

Lower Court Rulings - A Comment

Notably, neither the Connecticut District Court, nor the 2nd Circuit Appeals Court, contest that the facts alleged created a forum for protected speech under the First Amendment on the employer's private property. Indeed, the District Court seems to acknowledge that plaintiff adequately stated a First Amendment claim, noting: "Even if the amended complaint alleges a stand alone First Amendment claim, that claim would nevertheless fail for want of state action based on the same analysis above." (A6-A7) But the District Court's entire analysis (A3-A6) only discussed why there was no 'Connecticut' state action present

for the purposes of a 42 USC 1983 claim. [1] The District Court concluded:

> "Since the court finds that UTC is not subject to suit under §1983 because Emerick has failed to allege that UTC acted under color of [Connecticut] state law, the court must necessarily find that UTC is not subject to suit under the First and Fourteenth Amendments for want of state action." (A6).

The Appeals Court echoed this finding:

> "As there is no [Connecticut] state action for §1983 purposes, there is also no state action for First Amendment purposes." (B4).

The lower Courts' logic is in error. There are many violations of the First Amendment which do not invoke a 42 USC §1983 claim because they lack state action at the state level by state officials. While it is easy to rationalize dismissal of plaintiff's 42 USC §1983 claim for lack of Connecticut State action, it is conspicuous that neither the District nor Appeals Court attempted to address arguments solely related to a First Amendment claim. Rather they affirmed plaintiff's First Amendment rights, sub silento.

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[1] "The court addresses the question of whether UTC acted under color of state law when it failed to promote Emerick and terminated his employment." (A4) emphasis added.

State Action

"The law of state action ... has, to date, developed no precise, rigid test, ... for determining what conduct is government and what is private." Cologne v. Westfarms Ass., 192 Conn 48, 83 (1984). The question of how much government involvement constitutes "state action" does not lend itself to a simple answer. Rather, the task is one of "sifting facts and weighing circumstances. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856 (1961). Conduct that is formally private may become so entwined with governmental policies or so impregnated with a governmental character that it can be regarded as governmental action. Evans v. Newton, 382 U.S. 296, 299 (1966). Before making a decision on this matter the court must consider the totality of circumstances presented by the evidence in determining whether state action is present. Gilbreath v. E. Ark. Planning & Dev. Dist., 471 F. Supp. 912 (1972).

The basis for federal state action regarding plaintiff's First Amendment claim is contained in Complaint ¶11 (C2-C3). The District Court never addressed these allegations, concerning itself only with whether or not plaintiff's termination would come under color of Connecticut law.

There are case precedents for First Amendment rights on private property, and redress for violation of those rights by private parties on said private property. In Marsh v. Alabama, 326 U.S. 501 (1946), the court found a public forum in a company town. In Amalgamated Foods Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), a private shopping mall was a public forum for freedom of speech rights. In Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983), the First Amendment applied to a discharged employee who refused to lobby the state legislature on his private employer's behalf. While these cases stand for different propositions than arise in Emerick, they serve to demonstrate the

proposition that, for reasons stated therein, First Amendment and/or constitutional provisions, can apply to private property **against the objections of the owners.** Many state and federal courts have ruled on this matter on a case by case basis and affirmed or contradicted Marsh, Logan Valley and Novosel, for reasons cited therein. Two very important cases which failed to find federal or state constitutional speech protection on private property are Loyd v. Tanner, 407 U.S. 551 (1972), and Cologne v. Westfarms Ass., 192 Conn 48 (1984). The shortcomings noted therein regarding constitutionally protected speech are not present in Emerick.

In Loyd, the court refused to extend First Amendment rights to distribute handbills in a privately owned shopping mall because the subject of the hand billing was not directly related to any activity within the shopping center. In Emerick, expressing employee related concerns by participation in DIALOG and Straight Talk was directly and specifically provided for, and encouraged by, the private property owner at the behest of the federal government, and thereby does not suffer the deficiency noted in Loyd.

In Westfarms, the Connecticut Supreme Court found that private property did not provide a forum for Connecticut constitutional free speech **"against the objections of the owners"**. Id at 63. Westfarms raises a most significant and distinguishing factor found in Emerick that must be highlighted for consideration in later arguments. A review of all freedom of speech cases (federal and state) indicates that an aggrieved party's right of expression was violated or denied by the private property owner, a government official, or by the law. In Emerick, **the plaintiff was invited by his private employer, to express concerns in a forum on his employer's private property, as created by the private employer, at the behest of the federal government, for precisely that purpose**.

First Amendment claims must always be adjudicated in light of the special characteristics of the environment involved

in the particular case. Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 506 (1969). State action can exist in a private decision when the state has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice may be deemed that of the State. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). State legislation which encourages an activity may give rise to state action. Robinson v. Florida, 378 U.S. 1153, 84 S.Ct. 1693 (1964).

The evidentiary facts alleged, when taken as true, redoubtably prove the federal government exercised significant coercive power to force UTC to create and administer a First Amendment protected speech forum. The federal government must now permit First Amendment redress for employees who are injured by their employer when they use these First Amendment forums as intended by the federal government.

The Public Forum Analysis for Federal State Action

The quintessential public forum may be defined in the following manner: "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. ... [Such locations] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 515 (1939). At the other extreme the courts recognize that some government properties are decidedly 'non-public' for first amendment purposes. "[On public] property which is not by tradition or designation a forum for public communication ... the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. Perry Education Assn. V. Perry Local Educators' Assn., 460 U.S. 43, 46 (1983). A non-public forum is government property opened

to some but not all types of speech. Although it must permit expression of all viewpoints within the narrow category of speech that the government has intended to authorize, it may exclude other categories of speech. See Lamb's Chapel v. Center Moriches Union Ree School District, 959 F.2d 381, 387 (2d Cir. 1992). Plaintiff asserts that Emerick involves what may be described as a limited non-public forum created by the State on private property with the consent and cooperation of the private property owner, defendant UTC. See Cornelius v. NAACP Legal Def. Fund, 105 S.Ct. 3439, 3458 (1985).

Indeed, in its decision (B3) the 2nd Circuit Court acknowledged:

> "A state may be held responsible for private action only when it has exercised coercive power or has provided so much encouragement that the decision may fairly be viewed as that of the state. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)." (B3)

In Emerick, federal coercion and encouragement was applied specifically to create a forum for First Amendment protected speech on a defense contractor's private property (As noted earlier, neither the District nor Appellate Courts contest or deny that a First Amendment forum existed.). Incumbent in this forum is protection from retaliation for those who use it by its administrators. As a matter of law, it is not enough for the federal courts to recognize this First Amendment forum, they must also provide redress to employees for injury suffered from abusive private administration of the forum. Failure to do so risks damaging the credibility, the effectiveness, and the potential benefits these allegedly safe First Amendment protected speech forums were to provide to the federal government and the nation.

Supplemental Argument in a First Amendment Forum -
Due Process Right to Investigation before Dismissal

Building upon the argument of state action and UTC liability in a First Amendment forum is the case of Waters v. Churchill, 114 S.Ct. 1878 (1994). This case involved a public employee, a nurse, bringing an action alleging that her discharge violated the First Amendment. Inter alia, the court recognized "... **a broad new First Amendment right to an investigation before dismissal for speech** ...". Id at 1881. Recognizing plaintiff's First Amendment rights in these forums, (an allegation uncontested by the District and 2nd. Circuit Courts), then plaintiff was also entitled to such right of investigation. Because the public employee context is missing here, the private employer, UTC, would by default have to perform the same function as an agent or employee of the State in exercising the First Amendment requirements of Waters. Because UTC, as the forum administrator, is required to exercise powers reserved for the State, its action can also be classified as State action for the purpose of a First Amendment claim.

A Contractual Analysis for Federal State Action

In discussing a claim for compensatory damages the court in Holodnak, supra at 292, noted that **a private employer can contractually assume an obligation to observe the constitutionally protected interests of another**. As alleged in Complaint ¶11.2 (C3), there are clearly elements for an express or implied contract between the federal government and UTC through UTC's signing of a signatory agreement, wherein it promised to comply with and adhere to the recommendations of the Defense Industry Initiatives made pursuant to an Executive Order. These recommendations included the creation of a forum where employees can freely express employee concerns without retaliation; And that the defense contractor, UTC, would be

responsible for not only creating this forum, but also of self-governing it. Such promises by UTC form an implied contract to observe constitutional First Amendment rights in the forum, where the obvious benefit and consideration to UTC would be its continued consideration as an acceptable government contractor, and possible mitigation of liability; the benefit to the federal government would be to improve honesty in government contracts. Most importantly is that plaintiff, as an employee, is a third party beneficiary to any contract for First Amendment rights, having been provided a limited non-public forum for protected speech without retaliation.

UTC, and its employees who administered its Code of Ethics, Ombudsman and DIALOG programs, were acting under color of law as agents for the State, by implied or express contract, specifically to police the protected speech forums promised as signatories to the DII. This satisfies a First Amendment state action requirement from a contractual viewpoint.

Supplemental Grounds for a Contractual Argument
Liability Pursuant to Federal Law

48 CFR 203.7, which is a requirement for all defense contracts, provides another significant contractual basis for agency status for UTC employees involved in administration of a First Amendment protected speech forum. Therein, §203.7 requires of defense contractors "... the highest degree of integrity and honesty" and "... standards of conduct and internal controls..." and §203.7001 Procedures: specifically requires (1) standards of conduct and a written code of business ethics and conduct, and an ethics training program for all employees, and (2) a mechanism by which employees may report suspected instances of improper conduct; and ... (3) disciplinary action for improper conduct. Thereby the State has required the private employer, UTC, to police any retaliation against plaintiff for

exercising his First Amendment rights in the forums created. Any such administrative conduct by UTC, clothed under color and authority of the regulation, would clearly be as an agent of the State. In plaintiff's case, UTC has violated plaintiff's First Amendment rights when, as an agent of the State, it was UTC's duty to protect them.

Consideration of Corporate Ombudsman

Complaint ¶11.5 (C3) alleges the forums utilized by plaintiff, and protected by the First Amendment as argued, were administered by ombudsman. Although acknowledged by the District Court in its Ruling, Facts (A2), the court gives no further mention or consideration as to whether this ombudsman forum should be protected under the First Amendment. Communications made to ombudsman have repeatedly been identified by the courts as privileged, analogous to the relationship between attorney-client, doctor-patient, and priest-penitent. Privileged Communications, 98 Harv. L. Rev. 1450, 1456 (1985). On issues of evidentiary disclosure, courts have repeatedly found that communication between the office of defense contractor ombudsman and employees was privileged pursuant to the Federal Rule of Evidence 501 in the cases of Monoranjan Roy v. UTC, No. H-89-680JAC (D. Conn. 5/29/90); Kientzy v. McDonnel Douglas Corp., 133 F.R.D. 570, 571 (E.D.Mo. 1991). The ombudsman-employee relationship in a large defense contractor (such as UTC) has been found to aide in the remedy of workplace problems to benefit employees and possibly the nation. Kientzy, supra.

Because the ombudsman-employee relationship at UTC was specifically developed through federal State action to satisfy a specific government interest of promoting honesty in defense contracting, and this forum has already been recognized as deserving protection by federal courts, it forms yet another basis for recognizing First Amendment protection. While plaintiff

may not have been terminated by an ombudsman per se, those enlisted and entrusted by ombudsman to assist in administration of ombudsman run forums must be held to the same standards.

If the federal courts do not recognize the First Amendment rights of the ombudsman forums (incl. DIALOG) utilized by plaintiff, and protection from infringement by UTC administration, it could have very serious consequences for the future of these programs, and the honesty in government contracting they were to promote. Employees must know they can express legitimate concerns without fear of retaliation, or the programs will fail, not only at UTC, but in the defense industry as well.

State Action Owing to Links Between the Federal Government and UTC

A separate but no less substantive basis for recognizing a First Amendment claim is found in the case of Holodnak v. Avco-Lycoming of Stratford, 381 F.Supp. 191 (D.Conn., 1974), upheld 514 F.2d 285 (2nd Circ, 1975). In this case a private sector employee published an article critical of the company and was discharged. The court found that the links between the employer and the federal government were sufficient to make the private employer's action in discharging the employee for exercise of First Amendment rights "state action" under the Fourteenth Amendment. The evidence cited in Holodnak are compared to the evidentiary facts which may be proved in Emerick.

Holodnak	Emerick
o 80% of the work was defense related.	o 100% of work in plaintiff's department was government related.

o DOD maintained a 'large force' at the plant to oversee operations.	o Approximately 60-80 resident DOD DPRO/DCAS.[2]
o Most of the equipment was government owned.	o The same.
o Most of the land and buildings at this plant were owned by the government. [3]	o The land/buildings are privately owned.
o None	o A First Amendment forum was specifically required by the federal gov't and developed by the private employer. (¶11.1)
o None	o Ombudsman administered a forum for protected speech. (¶11.4)
o Court found employer had contracted to observe Constitutional Rights.	o Private employer contractually agreed to assume obligation to observe constitutionally protected interests. (¶11.2)

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[2] DOD DPRO/DCAS means Dept. of Defense "Defense Procurement Office" and "Defense Contracts Administration Services".

[3] Avco paid for the use of federal facilities through a negotiated deduction in each contract. See Holodnak, 514 F.2d at 289.

A notable difference in Holodnak is the ownership of the real estate; **This was not emphasized by the court as a salient or determining factor**. However in Emerick, there are significant other factors to include state action in creating a First Amendment forum; an important plus. The court should make a determination based on all of the factors involved, as done in Holodnak, to determine whether the retaliation and discharge of plaintiff should be considered State Action in this case. [4]

While this argument approaches First Amendment protection from a different perspective than the previous arguments, it is no less substantive. The plaintiff should be allowed, as in Holodnak, to file suit and establish by the evidence whether there were sufficient links between UTC and the federal

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[4] Contrary to findings made by the District Court (A3-A4), the plaintiff has made no claim that the acts of UTC become acts of the government by reason of UTC's significant and even total engagement in simply performing public contracts. Rather, the number and size of government contracts, as noted in Holodnak, is only one factor in determining whether there is a sufficient nexus between UTC and the federal government for state action to exist, or whether the forum within which plaintiff expressed himself should be protected by the state. When analyzing the various factors, one should consider the cumulative impact, which may justify a finding of state action. Rendell-Baker v. Kohn, 457 U.S. 830, 849, note 1 (1981). The logic therein cited was that although shipbuilders and dambuilders, like UTC, may be dependent on government contracts, they are not so closely supervised by the government. Distinct from this case, and others like it, are that in Emerick, unlike shipbuilders, dam builders, etc., the government has imposed a requirement for UTC, in its government contracts, to maintain and administer an open atmosphere where employees can express themselves without retaliation.

government for a finding of federal state action. The District and Appeals' courts were in error to deny the filing of a First Amendment claim without permitting a review of the above facts, and acknowledging that they could satisfy a First Amendment claim if proved.

Consideration of the Size of the Corporate Defendant

A subordinate, but important, factor to consider in whether or not there is state action present is the size of UTC. Large corporations play an important role in the lives of the great number of laborers today. Many of the facets existing in the company town, as identified in Marsh, supra, exist in large corporations like UTC, who employ hundreds of thousands of people. Corporate employees and their families enjoy benefits covering many aspects of their lives, to include health care, life, medical and disability insurance, counseling, pension and savings plans, educational assistance, child care, banking and investment, sports activities, personal and career growth programs, social activities, clubs, community assistance programs, etc. In addition to increasing inroads into the lives of corporate employees and their families, corporations also have a significant impact upon the health of the communities in which they are located by the sheer volume of employees involved. In the case of UTC the community becomes the state of Connecticut. Corporations like UTC, have grown increasingly active in community affairs and in attempting to influence political affairs through Political Action Committees (PACs) created under the 1971 Amendments to the Federal Election Campaign Act. The only notable difference between large corporations of today and the company town found in Marsh, is that UTC does not own the land upon which its employees homes are built.

It is the policy and ethics of UTC, at the behest of the federal government, to encourage open dialogue by its many thousands

of employees in areas of employee concerns without retaliation. Given the many facets of life influenced by the employer-employee relationship in mega corporations like UTC, and the extent to which these concerns could improve honesty in defense contracting as intended, employee concerns would cover the broad spectrum of speech protected in a public forum context of the company town, or a large shopping mall. Thus the limited non-public forum utilized by UTC employees, which UTC created and encouraged usage of at the behest of the federal government, is tantamount to an exercise of free speech as protected in the public forum context by the First Amendment.

Fifth & Fourteenth Amendment Not Violated

Permitting redress for violation of First Amendment rights on defendant UTC's private property does not constitute a violation of the Fifth Amendment's guarantee against taking property without just compensation, and the Fourteenth Amendment's protection against the deprivation of property without due process, because there would no taking when the value and use of the property are not impaired. In fact in Emerick the private employer willfully created a forum, and encouraged its use by policy and invitation, for the benefit of the employee, the employer, and the federal government. If anything this constituted a willful and voluntary, but carefully limited, use of UTC's property for the exercise of First Amendment rights.

After a finding of First Amendment rights in Emerick, its alleged infringement would be balanced against the employer's interest in job efficiency. Pickering v. Board of Education, 391 U.S. 563 (1968); As well as the time, place and manner of expression. Grayned v. Rockford, 408 U.S. 104, 115-117 (1971); State v. Linares, 232 Conn. 345, 382 (1995). A limited non-public forum in Emerick would suffer no later impediment based on these considerations, again based on the fact that

plaintiff's speech was at the beckoning of, and within the parameters established by, UTC and the federal government. Further, the balancing test would be a question for the trier of fact based on all the evidence, and is not a question that need be determined in permitting plaintiff to file a First Amendment claim, or survive a Motion to Dismiss.

Summarizing

Based on the facts discussed there is no denying the UTC Code of Ethics, ombudsman, DIALOG and Straight Talk programs, and plaintiff's participation in them, are directly attributable to US government encouragement, coercion, and regulations. They were intended by the federal government to serve a significant government interest, namely to create a protected First Amendment forum in the private workplace where employees of defense and government contractors are free to express employee concerns which, inter alia, would benefit the government and the nation through increased honesty and openness among government contractors.

The creation of these First Amendment forums on private property was made through cooperation of the owner of that property (UTC), who was to self-govern the forum for government benefit and to maintain their status as an acceptable supplier under government contracts.

The federal courts must permit redress for violation of a First Amendment right in a protected forum by private parties entrusted and required by the federal government to create and administer that forum. Private parties may incur liability for their conduct when the individual actor is a willful participant in joint activity with the State or its agents. Adickes, supra at 152. Both UTC and the Federal government were **joint participants and partners** in activity creating an allegedly protected forum for employee speech, intended to make private contracting with the U.S. government more honest for the government and

prolific for UTC.

First Amendment rights, subject to proper considerations, are guaranteed to employees who work for the federal government; they also protect private unionized employees under the National Labor Relations Act who act to secure a group benefit. NLRB v. Jones & Laughlin Steel Corp, 301 US 1,33 (1937). The only laborers currently unprotected is the non-unionized private sector employee. Giving consideration to the cumulative number of factors regarding state action in the creation and administration of the First Amendment forums at issue, and the nature of the corporate defendant hosting this forum, the Supreme Court must conclude that employees who express concerns within the limits prescribed by the forum deserve some modicum of protection by the First Amendment. The limited non-public forum in which plaintiff expressed himself was protected under the First Amendment and infringement by UTC constitutes a violation of the First Amendment for which UTC can be held accountable.

> "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." Thornhill v. Alabama, 310 U.S. 88, 103 (1940).

Where the State has entered the field of private corporate ethics and employee free speech in the private workplace, it places its power, image, and prestige into the activities of the private partner; Subsequent failure to recognize state action in the activities of the private partner in these areas, "... would in many cases permit the Government to endorse and encourage conduct in which it could not itself permissibly engage." Holodnak, supra at 289. Federal 'state action' is accounted for in the creation of the protected speech forum, incumbent in which is protection for the user by the private administrator of

the forum.

Failure to provide redress for violation of plaintiff's First Amendment rights by UTC, has the potential for causing significant harm to these protected speech forums which the federal government has gone to great lengths to create in the defense industry for the benefit of the government and the nation.

CONCLUSION

Plaintiff respectfully requests the Supreme Court of the United States reverse the judgments of the District Court of Connecticut and Second Circuit Court of Appeals, and permit plaintiff to file a First Amendment claim. Contrary to the lower courts' assertions, the facts alleged and argued, when taken as true, entitle plaintiff to relief under the First Amendment.

Respectfully submitted,

Roger Emerick

Roger Emerick, Pro Se
Plaintiff- Petitioner

No. ___

In the

Supreme Court Of The United States

October Term, 1996

ROGER EMERICK

Petitioner,

v.

UNITED TECHNOLOGIES CORPORATION

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF CONNECTICUT

APPENDIX

JUDGMENT OF THE DISTRICT COURT	A
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AMENDED COMPLAINT	C

APPENDIX A
DECISION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROGER EMERICK :
V. : Civil No. 3:95CV1833 (AHN)
UNITED TECHNOLOGIES CORP.:

RULING ON MOTION TO DISMISS
JAN 9, 1996 US DISTRICT COURT, BRIDGEPORT CONN.

The plaintiff, Roger Emerick ("Emerick"), brings this action pro se against his former employer United Technologies Corporation ("UTC") pursuant to 42 U.S.C. § 1983. Emerick alleges that UTC denied him a promotion and discharged him in violation of the First and Fourteenth Amendments of the United States Constitution.

Currently before the court is UTC's Motion to Dismiss and Emerick's Request for Leave to File Amended Complaint. For the reasons that follow, UTC's Motion to Dismiss [doc. #5] is GRANTED, and Emerick's Request for Leave to File Amended Complaint [doc. #8] is DENIED.

STANDARD OF REVIEW

In deciding a motion to dismiss, the court is required to accept as true all factual allegations in the complaint and must construe any well-pleaded factual allegations in the plaintiff's favor. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991), cert. denied, 112 S. Ct. 1943 (1992). A court may dismiss a complaint only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Allen v. Westpoint-Pepperell, Inc. 945 F.2d 40, 44 (2d Cir.

1991).

Where a plaintiff appears pro se, as here, the complaint must be liberally construed in the plaintiff's favor and must be held to "'lest stringent standards than formal pleadings drafter by lawyers.' " Estelle v. Gamble, 429 U.S. 97, 106 (1976) citations omitted; Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d cir. 1993), cert denied, 115 S. Ct 572 (1994); see also Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993) ("This caution applies with greater force where the complaint is submitted pro se or the plaintiff alleges civil rights violations.") (citation omitted), cert. denied, 114 S. Ct. 2749 (1994). "The proper test is whether the complaint ... states any valid ground for relief." Ferran, 11 F.3d at 22 (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

FACTS

For the purposes of this ruling, the court accepts the following facts as true.

UTC hired Emerick as an engineer in June, 1980. During the summer of 1993, Emerick participated in UTC's "Straight Talk" and "DIALOG" programs ("programs"). The programs were created and administered by UTC's ombudsman to provide alternative dispute resolution ("ADR"), facilitate honesty in defense spending, and to promote corporate self-criticism. The programs were enacted as a result of federal government encouragement and regulation in the form of executive orders, federal regulations, and congressional acts. UTC, through its Code of Ethics and other company policies, invited and encouraged Emerick's participation in the programs.

Through the programs, Emerick expressed concerns that bonuses awarded to UTC management were inappropriate in light of UTC's receipt of state aid, its "massive" lay-offs, and other sacrifices made by UTC employees and subcontractors. He also identified the harmful results of operating a company like UTC for near-term profit, and indicated his belief that UTC managers did so to facilitate management bonuses. In retaliation

for his participation in the programs, UTC denied Emerick a promotion and terminated his employment.

DISCUSSION

I. Motion to Dismiss

Section 1983 provides a civil cause of action for damages against any person who, acting under the color of state law, deprives another of a right, privilege or immunity secured by the Constitution or the laws of the United States. See 42 U.S.C. §1983. To state a claim under section 1983, a plaintiff must show both the existence of a federal constitutional or statutory right and the deprivation of that right by a person acting under color of state law. See Dwares v. City of New York, 985 F.2d 94, 98 (2d Cir. 1993) (citations omitted).

Section 1983 does not provided a re
medy for all constitutional injuries, but only for those caused by persons who are acting "under color of state law." Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) Thus, the court addresses the question of whether UTC acted under color of state law when it failed to promote Emerick and terminated his employment. The court finds that it did not. UTC is therefore not subject to suit under section 1983.

Emerick does not allege that UTC is a government entity. Rather, upon review of the complaint, the court construes Emerick to allege that UTC's actions as a private entity are attributable to the state in several ways. First, Emerick contends that the UTC programs were the result of government "encouragement and regulation". Specifically, Emerick argues that, because the UTC programs are "labor organizations" as defined by ;the Labor Management Relations Act of 1947, 29 U.S.C. §§31-101 to 31-111b. Consequently, Emerick alleges that UTC acted under color of state law when it retaliated against him for participating in the programs. The court disagrees.

The presence of state regulation alone does not convert

a private actor's conduct into state action. See, e.g., Blum v. Yaretskiy, 457 U.S. 457 U.S. 991, 1004 (1982) (private nursing home not state actor despite operating under extensive state regulation and receiving ninety percent of fees from state); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974) (private utility not state actor despite extensive regulation); Hadges v.Yonkers Racing Corp., 918 F.2d 1079, 1081 (2d Cir. 1990) (closely-held corporation operating race track did not act under color of state law despite extensive regulation), cert. Denied, 499 U.S. 960 (1991). Nor does a private party's use of the procedures, or power, authorized under such regulations. See, e.g. Blum 457 U.S. at 1006-o07; Kohn, 457 U.S. at 841-42; Jackson, 419 U.S. at 357.

State regulation of a private entity is state action only when "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson, 419 U.S. at 351. See also Hadges, 918 F.2d at 1081. "[A] State normally can be responsible for a private decision only when it has exercised coercive power or had provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Blum, 457 U.S. at 1004. Emerick's complaint does no more that allege that the UTC programs in which he participated were the "result of" federal "regulation and encouragement". He does not allege that a State official directly participated in UTC's decision to deny him a promotion or to terminate his employment, or that the State requested such action. Thus, this argument for state action fails. See Jackson, 419 U.S. at 357 ("respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State does not make its action in doing so 'state action'").

Second, Emerick argues that UTC's "extensive and sufficient links with the federal government through defense and government contracts" is state action. The court disagrees. As

succinctly stated by the Supreme Court in Kohn, "[acts of ... private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." Kohn, 457 U.S. at 841. Accordingly, Emerick's second argument for state action also fails.

Third, Emerick argues that ADR has traditionally and exclusively been the prerogative of the state through the courts and Connecticut's Board of Mediation and Arbitration as provided in Conn. Gen. Stat. §§ 31-91 to 31-100. Emerick thus alleges that UTC's ombudsman's exercise of ADR through the UTC programs is a "public function" constituting state action. See, e.g., Kohn, 457 U.S. at 842 (private entity state actor when it performs a function which has "traditionally [been] the exclusive prerogative of the state."). The court disagrees. In the Second Circuit, the provision of legal services by a private entity has not been viewed as a "public function" when that entity is not under the supervision or control of the State. See Lefcourt v. Legal Aid Soc'y, 445 F.2d 1150, 1157 (2d Cir. 1971) (provision of legal services to indigent by Legal Aid Society not state action for the purposes of § 1983 action). Because Emerick has not alleged any basis for state supervision or control of the ombudsmen's exercise of ADR, his third argument for state action fails.

Finally, Emerick contends that, because the employment actions taken against him by UTC violated Conn. Gen. Stat. § 31-51q,[1] UTC acted under color of that statute. The court again

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[1] Section 31-51q of the Connecticut General Statutes reads in relevant part:

> Any employer, ... who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4, or 14 of article first of the constitution of the state, ... shall be liable to such employee for damages caused by such discipline or

disagrees. As UTC correctly argues, section 31-51q does not authorize its alleged improper conduct, it prohibits it. Because section 31-51q is not a grant of power to UTC, nor does it clothe UTC with state authority, see Monroe v. Pape, 365 U.S. 167, 184 (1961) (defining "under color of state law" as the "[misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law.") (citations and internal quotations omitted), it cannot be a basis for attributing state actor status to UTC.

The court therefore finds that Emerick has failed to allege sufficient facts demonstrating that UTC acted under color of state law in denying him a promotion and terminating his employment. Accordingly, the court finds that Emerick has failed to state a claim against UTC under section 1983.

As to Emerick's First and Fourteenth Amendment claims, it is "commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." Hudgens v. NLRB, 424 U.S. 507, 512 (1976). Since the court finds that UTC is not subject to suit under section 1983 because Emerick has failed to allege that UTC acted under color of state law, the court must necessarily find that UTC is not subject to suit under the First and Fourteenth Amendments for want of state action. See, e.g. Kohn, 457 U.S. at 838 ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment.") (citations and internal quotations omitted).

II. Motion for Leave to File Amended Complaint

Emerick has moved for leave to file an amended complaint, arguing that he has a "stand alone" First Amendment claim which is independent of his section 1983 cause of action. Rule 15(a) requires that a court's permission to amend a

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discharge ...

Conn. Gen. Stat. Ann. §31-51q (1987).

pleading "shall be freely given when justice so requires." See Rule 15(a), Fed. R. Civ. P. In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court explained that: "[i]n the absence of any apparent or declared reason--such as ... futility of the amendment etc. -- the leave should, as the rules require, be 'freely given.'" Foman, 371 U.S. at 182. The decision whether to grant leave to amend, however, is within the court's sound discretion. See id..

Upon review of the amended complaint, the court finds that it would be futile to grant Emerick leave to amend. Even if the amended complaint alleges a stand alone First Amendment claim, that claim would nevertheless fail for want of state action based on the same analysis above. See Kohn, 457 U.S. at 839 ("under color of state law" analysis identical to "state action" analysis under Fourteenth Amendment). Because his amended complaint is deficient for the same reasons as his original complaint, Emerick's motion for leave to file amended complaint must be denied.

CONCLUSION

For the foregoing reasons, UTC's Motion to Dismiss [doc. #5] is GRANTED and Emerick's Motion for Leave to File Amended Complaint [doc. #8] is DENIED. The complaint is DISMISSED in its entirety.

SO ORDERED this 5th day of January, 1996 at Bridgeport, Connecticut.

s/Allan H. Nevas
ALLAN H. NEVAS
U.S. DISTRICT JUDGE

APPENDIX B

JUDGMENT OF THE APPELLATE COURT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City and County of New York, on the 22nd day of November, one thousand nine hundred and ninety-six.

PRESENT: HONORABLE J. EDWARD LUMBARD,
HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE JOSE A. CABRANES
Circuit Judges

UNITED STATES COURT OF APPEALS SECOND CIRCUIT, FILED NOV 22, 1996, GEORGE LANGE III, CLERK

ROGER EMERICK,
Plaintiff Appellant,

v. No. 96-7295

UNITED TECHNOLOGIES CORP.
Defendant-Appellee.

FOR APPELLANT: Roger Emerick, Pro se.

FOR APPELLEE Edward J. Dempsey, United Technologies Corp., Hartford, CT.

Appeal from the United States District Court for the District of Connecticut (Nevas, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Emerick v. United Technologies Corp., No. 96-7295

In June 1980, United Technologies Corp. ("UTC"), a defense manufacturer, hired Roger Emerick ("Emerick") as an engineer. During the summer of 1993, Emerick participated in two company programs known as "Straight Talk" and "DIALOG". These programs were created at the encouragement of the federal government to provide alternative dispute resolution, facilitate honesty in defense spending, and promote corporate self-criticism.

Through these programs, Emerick criticized UTC's management. Emerick claims that UTC denied him a promotion and terminated his employment in retaliation for his views.

Emerick sued in the United States District Court for the District of Connecticut (Nevas, J.) Alleging a violation of 42 U.S.C. §1983. UTC moved to dismiss the complaint for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). The district court granted the motion. Emerick then moved to amend his complaint to state a stand \-

alone First Amendment claim. The district court denied the motion because such an amendment would be futile.

Emerick now appeals, arguing that (1) the district court erred when it dismissed his complaint; and (2) the district court abused its discretion when it denied him leave to file an amended complaint.

We review a district court's dismissal of a complaint for failure to state a claim de novo and will affirm only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Citibank v. K-H Corp., 968 F.2d 1489, 1494 (2d Cir. 1992).

42 U.S.C. §1983 provides a civil cause of action against a person, acting under color of state law, who deprives one of a right, privilege or immunity guaranteed by the Constitution or the laws of the United States. A party who claims that Constitutional rights have been violated must first establish that the challenged conduct amounts to state action. United States v. International Bhd. Of Teamsters, 941 F.2d 1292, 1295 (2d Cir. 1991). If there is no state action, the inquiry ends. See id at 1297.

A state may be held responsible for private action only when it has exercised coercive power or has provided so much encouragement that the decision may fairly be viewed as that of the state. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

UTC's firing of Emerick did not constitute state action, and therefore, dismissal of the action for failure to state a claim was appropriate. UTC is a private corporation. Although it has numerous government contracts, and uses some government owned equipment, its facilities and land are privately owned. Additionally, the government does not participate in its employment decisions. There is an insufficient connection between UTC and the government to find state action. See Sherlock v. Montefiore Medical Center, 84 F.3d 522, 527 (2d Cir. 1996).

Emerick also argues that the district court abused its

discretion when it denied his motion to file an amended complaint. We review a denial of leave to amend a complaint for abuse of discretion. Foman v. Davis, 371 U.S. 178, 182 (1962). IT is not an abuse of discretion to deny leave to amend a complaint when the amendment would be futile. Id.

As there was no state action for §1983 purposes, there is also no state action for First Amendment purposes. Allowing Emerick to amend his complaint would have been futile, and therefore, the district court did not abuse its discretion.

We have considered all the additional arguments raised by Emerick, and find them to be without merit.

Accordingly, the judgment of the district court is AFFIRMED.

s/HONORABLE J. EDWARD LUMBARD
s/HONORABLE JOSEPH M. McLAUGHLIN
s/HONORABLE JOSE A. CABRANES
Circuit Judges

APPENDIX C
AMENDED COMPLAINT

ROGER EMERICK	: Civil Action No.
Plaintiff	: H-395CV01833(AHN)
VS.	:
UNITED TECHNOLOGIES CORP	:
Defendant	: JURY TRIAL DEMANDED
	: NOVEMBER 15, 1995

AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

1 This action is brought by plaintiff for a declaratory judgment and for compensatory and punitive damages against defendant, who, acting under color of law, charter, ordinances, regulation, custom or usage have denied plaintiff his 1st Amendment right to freedom of speech and 14th Amendment right to due process of law under the United States Constitution and have wrongfully and abusively discharged him from employment in violation of his rights.

II. JURISDICTION

2 This Court has jurisdiction pursuant to 28 U.S.C. §1331, §1343, §2201, and §2202. The amount in controversy, exclusive of interest and costs, exceeds $50,000.

III. THE PARTIES

3 The, plaintiff, Roger Emerick, is a citizen of the United States, and a resident of Glastonbury, Connecticut.

4 The defendant, United Technologies Corporation (UTC), is a large Connecticut-based corporation with extensive defense and government related contracts.

IV. COMPLAINT 42 USC 1983

5 The plaintiff was hired as an engineer in June 1980. In that position he was a salaried, at-will, exempt employee.

6 During 1993 plaintiff was concerned about dishonesty and fraud in the management of the corporation. He felt that a corporation receiving state aid, exercising massive layoffs, and requiring compensation and labor sacrifices by both employees and local community subcontractors, and exercising other profit-oriented measures, allegedly for the purpose of sustaining corporate viability, should not be giving bonuses to managers, nor should cost savings be looted by managers who were dishonestly and fraudulently providing themselves with bonuses, especially after management had declared that all employees would have to sacrifice to help the corporation survive.

7 In July 1993 plaintiff participated in a company sponsored "Straight Talk" program and expressed these concerns to his company president.

8 In August 1993 plaintiff participated in the company "DIALOG" program and expressed concerns of the potential harm of managing a corporation for near term profit, specifically identifying the proposed sale of a product line to an out of state company, and that motivation was to benefit a few individuals with bonuses.

9 As a result of participation in the "Straight Talk" and "DIALOG" programs, agents for the defendant retaliated against plaintiff by denying him a promotion and terminating his employment.

10 Plaintiff's participation in these programs was an exercise of his 1st Amendment right to freedom of speech, and the defendant's retaliation against plaintiff for the exercise of that right constituted "state action" under the Fourteenth Amendment.

11 The Straight Talk and DIALOG programs, and plaintiff's participation in them, were the result of "state action" and/or under color of law for the following

reasons:

11.1 These programs, and plaintiffs participation in them, were the result of Federal government encouragement and regulation in the form of Executive Orders, Federal regulations, and Congressional Acts.

11.2 The defendant had contracted with the US government to provide plaintiff freedom of speech rights through a written signatory commitment to a Presidential Executive Order encouraging open employee/management communication without fear of retaliation.

11.3 The defendant, in the department in which plaintiff worked, had extensive and sufficient links with the federal government through defense and government contracts, extensive DCAS and DPRO presence, and government owned equipment, to invoke state action.

11.4 These programs were created, and administered by ombudsman, to 1) promote honesty and reduce fraud in government and defense spending, 2) provide alternative dispute resolution, and 3) provide corporate self-criticism.

11.5 The defendant, through its Code of Ethics and other company polices, invited and encouraged plaintiff to express employee concerns through DIALOG and "Straight Talk" without fear of retaliation, thus creating a limited public forum.

12 As a result of said retaliation, plaintiff suffered a loss of promotion, a loss of wages, a loss of employment and earning capacity, a loss of benefits including pension, health and other consequential damages, medical costs, a loss of further economic opportunity, emotional distress, damage to his personal life, and legal damages.

13 The conduct of defendant was negligent, and/or reckless and wanton, and/or willful and malicious.

14 The actions of the defendant were taken under color of

Connecticut General Statute 31-51q.

15 The actions and conduct of defendant constitutes a violation of plaintiff's freedom of speech rights and due process of law under the First and Fourteenth Amendments of the U.S. Constitution.

IV. COMPLAINT COUNT #2: VIOLATION OF THE FIRST AMENDMENT

16 Paragraphs 5 through 13, and 15 are repeated.

WHEREFORE, the plaintiff requests a jury trial and prays for:

a: A finding of jurisdiction over his Complaint;

b: Entry of a declaratory judgment declaring defendant violated plaintiff's 1st and 14th Amendment rights;

c: An award in consideration of damages suffered, to include compensatory, punitive and reasonable attorney fees (pursuant to 42 U.S.C.§1988) and costs.

by the plaintiff

s/Roger Emerick
Roger Emerick, Pro Se
580 Hopewell Rd.
S. Glastonbury, Ct. 06073
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